SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 593

GENE DURFEE, ET UX., PETITIONERS,

vs.

JULIA E. DUKE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Western District of Missouri, St. Joseph Division		
Petition for removal	1	1
Petition filed in the Circuit of Holt County, Missouri, Case #2951 (excerpts)	9	3
Notice of removal	13	5
Alternative motion to dismiss or for summary judgment; and answer of defendants Gene Durfee and Laura Durfee	42	6
Exhibit B—Amended petition filed in the District Court of Richardson County, Nebraska (excerpts)	50	9
Exhibit C—Answer filed in the District Court of Richardson County, Nebraska	54	13

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 11, 1963

	Original	Print
Record from the United States District Court for the Western District of Missouri, St. Joseph Division—Continued		
Alternative motion to dismiss or for summary judgment; and answer of defendants Gene Durfee and Laura Durfee—Continued		
Exhibit E—Decree filed in the District Court of Richardson County, Nebraska	57	15
Exhibit F—Opinion of Supreme Court of Nebraska, Simmons, C. J., Case No. 34523	59	17
Exhibit G—Mandate of Supreme Court of Nebraska, in case No. 34523	79	29
Memorandum opinion, findings of fact and conclusions of law, Duncan, J.	186	30
Order correcting memorandum opinion, etc.	204	43
Decree	205	44
Notice of appeal	211	50
Order extending time for appeal	218	51
Clerk's certificate (omitted in printing)	329	51
Proceedings in the United States Court of Appeals for the Eighth Circuit	330	52
Opinion, Blackmun, J.	330	52
Judgment	354	73
Order denying petition for rehearing en banc and denying rehearing	355	74
Order staying issuance of mandate	356	75
Clerk's certificate (omitted in printing)	357	75
Order allowing certiorari	358	76

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Case No. 1027

JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, RALPH KEIFFER, RUSSELL NAUMAN, FIRST STATE BANK, Forest City, Missouri, a corporation, and JAMES H. PETTIJOHN, Trustee, Defendants.

PETITION FOR REMOVAL—Filed June 9, 1959

Petitioners, Gene Durfee and Laura Durfee, respectfully show unto the Court as follows:

1) Petitioners, Gene Durfee and Laura Durfee, are a part of the defendants in the above entitled action; that the other defendants, namely, Ralph Keiffer, Russell Nauman, First State Bank, Forest City, Missouri, a Corporation, and James H. Pettijohn, Trustee are not indispensable defendants and are merely nominal or formal defendants, and are in a separable controversy.

2) The above entitled action was commenced in the Circuit Court for the County of Holt, State of Missouri, and is now pending in that Court. Process was served on the petitioners on the 25th day of May, 1959. A copy of the plaintiff's petition setting forth the claim for relief upon which the action is based was first received by the petitioners on the 25th day of May, 1959.

3) The action is a civil action to determine the estate, [fol. 2] title and interest of the parties in certain real estate described therein and the United States District Court for

the Western District of Missouri, St. Joseph Division has jurisdiction by reason of the diversity of citizenship of the parties as your petitioners are citizens of Falls City, Holt County, Nebraska, and the plaintiff, Julia E. Duke is a citizen of St. Joseph, Buchanan County, Missouri.

4) The matter in controversy exceeds, exclusive of costs and disbursements, the sum of $10,000.00. No change of citizenship of parties has occurred since the commencement of the action.

5) This petition is accompanied by a bond conditioned as required by law.

6) Copies of all process, pleadings and orders served upon petitioners are filed herewith.

Wherefore, your petitioners pray that this action be removed.

Dated this 9th day of June, 1959.

Theodore M. Kranitz, Kranitz and Kranitz, 714 Francis Street, St. Joseph, Missouri, Telephone: 2-4409;

August Ross, City National Bank Bldg., Omaha, Nebraska, Telephone AT 3525;

Alfred A. Fiedler, 600 Keeline Building, Omaha 2, Nebraska, Telephone: AT 3525;

Attorneys for Petitioners and Defendants Gene Durfee and Laura Durfee.

[fol. 3] *Duly sworn to by Gene Durfee and Laura Durfee, jurat omitted in printing.*

[fol. 9]

IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI

Case #2951

JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, RALPH KEIFFER, RUSSELL NAUMAN, FIRST STATE BANK, Forest City, Missouri, a corporation, and JAMES H. PETTIJOHN, Trustee, Defendants.

PETITION

I

Plaintiff, for her cause of action, states that she is the owner in fee simple of, and in possession of the following described real estate, lying, being and situate in the County of Holt, and State of Missouri, to-wit:*

* * * * * *

[fol. 11]

II

Plaintiff further states that the Defendants, Gene Durfee and Laura Durfee, husband and wife, claim some interest in and to said real estate, the nature and character of which is unknown to Plaintiff and cannot be described herein except that said claim is adverse and prejudicial to this Plaintiff.

III

Plaintiff further states that the Defendants, Ralph Keiffer and Russell Nauman, are in possession of a part of said real estate as the tenants of Plaintiff and that their only interest in and to said real estate is as tenants of Plaintiff.

IV

Plaintiff further states that the Defendant, First State Bank of Forest City, Missouri, is, and was at all the times

* (Clerk's Note: Counsel have agreed that a complete description of the land in controversy may be omitted.)

mentioned herein a banking corporation duly organized and existing under and by virtue of the laws of the State of Missouri and with its principal place of business in the City of Forest City, Holt County, Missouri; that the only interest of the Defendant, First State Bank, Forest City, Missouri, is as beneficiary under a deed of trust dated the 21st day of November, 1956, of record in the office of the Recorder of Deeds within and for Holt County, Missouri, in Book 215, at page 134, wherein the real estate hereinabove described was conveyed to James H. Pettijohn, as Trustee, to secure to the Defendant, First State Bank, Forest City, Missouri, the payment of a certain promissory note for the sum of $10,000 in said deed described, the said James H. Pettijohn taking the legal title thereto, as trustee, with the bank to sell the same for the payment of said note; and that the interest of the Defendant, James H. Pettijohn, in and to the real estate hereinabove described is as Trustee under said Deed of Trust.

V

Wherefore, the premises considered, Plaintiff prays the Court to try, ascertain and determine the estate, title and interest of the parties, Plaintiff and Defendants, herein, severally in and to the above described real estate, and to define and adjudge by its judgment and decree that the Plaintiff is the fee simple owner of in and to said real estate; and that the Defendants, Gene Durfee and Laura Durfee, husband and wife, nor either of them, or anyone for them or in their behalf, have any right, title or interest in and to said real estate; and that they be forever enjoined and restrained from asserting, claiming, or setting up any right, title or interest in and to said real estate; and for her costs in this behalf expended.

[fol. 12] Wiltse & Wiltse, By John Wiltse, 1622 Stone Street, Falls City, Nebraska, Telephone Number 3919;

Pettijohn & Eiser, By J. R. Eiser, Oregon, Missouri, Telephone Number 45,

Attorneys for Plaintiff.

[fol. 13] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

Civil No. 1027

[Title omitted]

NOTICE OF REMOVAL—Filed June 9, 1959

To: Wiltse and Wiltse, 1622 Stone Street, Falls City, Nebraska; Pettijohn and Eiser, Oregon, Missouri, Attorneys for the Plaintiff in the above entitled cause: Ralph Keiffer, Russell Nauman, First State Bank, Forest City, Missouri, a Corporation, and James H. Pettijohn, Trustee.

Please take notice that defendants, Gene Durfee and Laura Durfee, husband and wife, on June 9, 1959, filed in the United States District Court for the Western District of Missouri, St. Joseph Division, a petition and bond for the removal of the above entitled cause from the Circuit Court for the County of Holt, State of Missouri, case Number 2951, copies of said petition and bond are hereto attached.

Dated this 9 day of June, 1959.

Theodore M. Kranitz, Kranitz and Kranitz, 714 Francis Street, St. Joseph, Missouri, Telephone: 2-4409;

August Ross, City National Bank Bldg., Omaha 2, Nebraska, Telephone: AT 3525;

Alfred A. Fiedler, 600 Keeline Building, Omaha 2, Nebraska, Telephone: AT 5311,

Attorneys for Petitioners and Defendants Gene Durfee and Laura Durfee.

[fol. 42] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH, MISSOURI

Civil Action No. 1027

[Title omitted]

ALTERNATIVE MOTION TO DISMISS OR FOR SUMMARY JUDGMENT; AND ANSWER OF DEFENDANTS GENE DURFEE AND LAURA DURFEE—Filed June 15, 1959

Alternative Motion to Dismiss or for Summary Judgment

Come now defendants Gene Durfee and Laura Durfee, husband and wife, and move the court alternatively to dismiss the petition of plaintiff as against Ralph Keiffer, and Russell Nauman, or to grant summary judgment for said defendants under Rule 56, on the ground that the petition of plaintiff states no cause of action against said defendants, for the reason that it is alleged in the petition of plaintiff, in paragraph 3 thereof, that said defendants Keiffer and Nauman have no such right, title, or interest in and to the real property which is the subject of this cause of action, as to make them proper parties hereto.

Whereof, defendants Durfee pray the judgment of the court.

[fol. 43] Answer

Come now defendants Gene Durfee and Laura Durfee, husband and wife, and for answer to the petition of plaintiff allege and state:

I

That they deny each and every allegation contained in paragraph 1 of the petition of plaintiff.

II

Affirmative Defense—Res Judicata: That on or about the 11th day of November 1956 these defendants Durfee instituted an action in the District Court of Richardson County, Nebraska, a court of general jurisdiction, wherein plaintiff Julia E. Duke was duly named and served as a party defendant, the general nature and object of said cause of action being to try, determine, and quiet the title to the real estate mentioned in paragraph I of the petition of plaintiff Duke herein; that said Julia E. Duke duly appeared, answered said petition of these defendants in the said District Court of Richardson County, Nebraska, and, on trial on or about the 27th and 28th days of May 1958, asserted title to said real estate mentioned in paragraph I of her petition in this cause of action by reason of a Missouri Swamp Land Patent then and there introduced in evidence; that on or about the 2d day of August 1958 the said District Court of Richardson County, Nebraska, made and entered its findings and decree in favor of these defendants (plaintiffs in that cause of action); that thereafter, in due course, plaintiff prosecuted her appeal to the Supreme Court of the State of Nebraska; that the said Supreme Court of the State of Nebraska, on or about the 27th day of March 1959 affirmed the decree of the District Court of Richardson County, Nebraska, and quieted and confirmed title to said property in defen-
[fol. 44] dants Durfee and against the claims of plaintiff Duke; that on or about the 5th day of June 1959, the mandate of said Supreme Court of the State of Nebraska to the District Court of Richardson County, Nebraska, affirming said decree was entered of record.

That by reason of all of the foregoing, the claim of plaintiff set forth in her petition has been previously adjudicated and determined, and that the real property described in the decree entered in the District Court of Richardson County, Nebraska, is identically the same real estate described in the Missouri Swamp Land Patent of Julia E. Duke (Exhibit 12 in said Nebraska action; Exhibit D attached hereto), and in paragraph I of plaintiff's petition herein.

III

That the following exhibits are attached to the Court's copy hereof and made a part hereof by reference the same as though set out at length herein:

Exhibit A—Petition in the District Court of Richardson County, Nebraska, Gene Durfee, plaintiff, v Julia E. Duke et al, defendants, Case No. 12120.

Exhibit B—Amended petition in same cause (Laura Durfee was added as a party plaintiff, by leave of Court, during trial of the cause).

Exhibit C—Answer of defendant Julia E. Duke to the petition set out as Exhibit A.

Exhibit D—Missouri Swamp Land Patent.

Exhibit E—Decree of the District Court of Richardson County, Nebraska.

Exhibit F—Opinion of the Supreme Court of Nebraska, same case on appeal, No. 34522.

Exhibit G—Mandate of the Supreme Court of Nebraska.

IV

That these defendants deny each and every allegation of [fol. 45] plaintiff's petition not specifically admitted herein.

Wherefore, having fully answered, these defendants pray that they be discharged, and that they go hence with their costs.

Kranitz & Kranitz, 714 Francis Street, St. Joseph, Missouri, Telephone ADams 2-4409;

August Ross, City National Bank Bldg., Omaha, Nebraska, Telephone ATlantic 3525;

Alfred A. Fiedler, 600 Keeline Building, Omaha 2, Nebraska, Telephone ATlantic 5311;

By Theodore M. Kranitz, Attorneys for Defendants Durfee.

[fol. 50]

EXHIBIT "B" TO ALTERNATIVE MOTION AND ANSWER

IN THE DISTRICT COURT OF RICHARDSON COUNTY
NEBRASKA

#12120

Doc. 28 No. 96

FILED
May 17 1957
Fred C. Zorn

GENE DURFEE,

Plaintiff,

vs.

RALPH KEIFFER, if married, ... KEIFFER, his wife, first, real and true name unknown; RUSSELL NAUMAN, if married, ... NAUMAN, his wife, first, real and true name unknown; JOHN DOE and JANE DOE, husband and wife, real names unknown; NELLIE N. DUKE, if married, ... DUKE, her husband, first, real and true name unknown; JULIA E. DUKE, if married, ... DUKE, her husband, first, real and true name unknown; all persons having or claiming any right, title or interest in or to all of that part of Sections Seventeen (17), Twenty (20), Twenty-one (21), Twenty-two (22), and Twenty-three (23), Township 1 North, Range 18 East of the 6th P.M. in Richardson County, Nebraska, bounded on the north and east by the survey line of 1855-56 as established by the Surveyor General's Office of the United States, being the then meander line of the middle of the channel of the Missouri River, and bounded on the west and south by the present meander line of the said Missouri River, real names unknown,

Defendants.

AMENDED PETITION

COMES Now plaintiff and for cause of action against the defendants, and each of them, alleges:

I.

That plaintiff is the owner in fee simple of the following described real estate, to-wit:

All of that part of Sections Seventeen (17), Twenty (20), Twenty-one (21), Twenty-two (22), and Twenty-three (23), Township 1 North, Range 18 East of the 6th P.M. in Richardson County, Nebraska, bounded on the north and east by the survey line of 1855-56 as established by the Surveyor General's Office of the United States, being the then meander line of the Middle of the channel of the Missouri River, and bounded on the west and south by the present meander line of the said Missouri River.

II.

Plaintiff further alleges that said described real estate is wholly within the State of Nebraska; that said property [fol. 51] lies immediately west of the old survey line of 1855-56, which survey line was the meander line of the middle of the channel of the Missouri River; that said survey was conducted under the supervision and direction of the Surveyor General's Office, P. W. Hitchcock, Surveyor General, under the Department of Interior of the United States Government; that said survey line of 1855-56 is the true boundary line between the states of Nebraska and Missouri; that the meander line of the middle of the channel of the Missouri River was the established east boundary of the State of Nebraska upon its admission to the Union; that the meander line of the said river at the time the State of Nebraska was admitted to the Union, March 1, 1867, was the same as established by the survey of 1855-56; that so much of said survey as constitutes the boundary of the real estate referred to herein is attached hereto, marked Exhibit "A" and by reference made a part hereof; that the Missouri River which formed the boundary between the said states changed its course to its present course as the result of avulsions which occurred in the year 1916, and that the boundary between said states remains as it existed at the time of said survey.

That Exhibit "A", attached to petition herein, is from the official records of the County Surveyor of Richardson County, and that said survey of 1855-56 is recorded in said County at Plat Book 1, Page 23.

III.

The plaintiff is reliably informed that the defendants Ralph Keiffer and Russell Nauman and John Doe and Jane Doe, husband and wife, real names unknown, are in possession of part of the hereinabove described real estate; that plaintiff does not know what interest, if any, said defendants may have or claim in and to said described real estate; that whatever interest said defendants may have or claim in and to said described property, the same is junior and inferior to plaintiff's title thereto.

IV.

That the defendants Nellie N. Duke, if married, ... Duke, her husband, first, real and true name unknown; Julia E. Duke, if married, ... Duke, her husband, first, [fol. 52] real and true name unknown; have or appear to have or claim some right, title or interest in and to said described real estate; that whatever interest said defendants may have or claim, the same is junior and inferior to plaintiff's title thereto.

V.

Plaintiff further alleges that after diligent search, investigation and inquiry, he has been unable to ascertain and does not know the whereabouts, if in this State, the residence of or place of abode of the following named defendants, to-wit: Ralph Keiffer, if married, ... Keiffer, his wife, first, real and true name unknown; Russell Nauman, if married, ... Nauman, his wife, first, real and true name unknown; John Doe and Jane Doe, husband and wife, real names unknown; Nellie N. Duke, if married, ... Duke, her husband, first, real and true name unknown; Julia E. Duke, if married, ... Duke, her husband, first, real and true name unknown.

VI.

Plaintiff further alleges that there are persons who have or appear to have some right, title or interest in or to such property, and that the ownership, interest in, right or title to, or lien upon such property of such persons does not appear of record in or by their respective names in Richardson County, Nebraska, and that plaintiff after diligent investigation and inquiry is unable to ascertain and does not know the names or whereabouts, if in this State, or the residence of such persons, who have been designated as defendants herein as "all persons having or claiming any right, title or interest in or to all of that part of Sections Seventeen (17), Twenty (20), Twenty-one (21), Twenty-two (22), and Twenty-three (23), Township 1 North, Range 18 East of the 6th P.M. in Richardson County, Nebraska, bounded on the north and east by the survey line of 1855-56 as established by the Surveyor General's Office of the United States, being the then meander line of the middle [fol. 53] of the channel of the Missouri River, and bounded on the west and south by the present meander line of the said Missouri River, real names unknown."

Wherefore, plaintiff prays for a Decree of this Court quieting and confirming plaintiff's title in and to the herein described real estate and against the claims of the defendants, or any one claiming by, through or under said defendants, and for such other and further relief as equity may require.

Gene Durfee, Plaintiff,

By /s/ Fitzgerald, Ross & O'Connor
His Attorneys

State of Nebraska)
) ss.
County of Douglas)

Gene Durfee, being first duly sworn on oath, deposes and states that said affiant is the petitioner herein; that he has read the above and foregoing Petition, knows the contents thereof and that the same are true as he verily believes.

/s/ Gene E. Durfee

Subscribed and sworn to before me this 16 day of May, 1957.

/s/ Laura M. Jones
Notary Public

(Seal)

[fol. 54]

Exhibit "C" to Alternative Motion and Answer

In the District Court of Richardson County
Nebraska

Filed
Jul 27 1957
Fred C. Zorn, Clk of Dist Ct

Gene Durfee — Plaintiff

vs.

Ralph Keiffer, et al — Defendants

Answer

Come now Ralph Keiffer, Deana Keiffer, Russell Nauman and Caroline Nauman, Nellie M. Duke and Julia E. Duke, defendants, and for their answer to the Amended Petition of the plaintiff allege and say:

I

That the lands described in the petition of the plaintiff, and for the recovery of which the action is brought, are wholly situated in Holt County, Missouri, and not within the jurisdiction of this Court.

II

Defendants deny each and every allegation contained in plaintiff's petition which is not herein specifically admitted to be true.

III

Defendants admit that they are in possession of a portion of the land described in plaintiff's petition and that defendants Nellie M. Duke and Julia E. Duke claim to be the owners of the portion of the land described in plaintiff's petition.

Wherefore defendants pray that plaintiff's petition be dismissed at plaintiff's costs and that defendants recover their costs herein expended and for such other and further relief as may be just and equitable in the premises.

Ralph Keiffer
Deana Keiffer
Russell Nauman
Caroline Nauman
Nellie M. Duke
Julia E. Duke
Defendants

By /s/ Pettijohn & Eiser
and /s/ Wiltse & Wiltse
Their Attorneys

[fol. 55]

State of Nebraska)
) ss
Richardson County)

John H. Wiltse being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendants in the above entitled action and that he makes this verification as attorney for the reason that the defendants are absent from Richardson County, Nebraska; that he knows the contents of the foregoing answer and that the allegations therein contained are true as he believes.

.....

Subscribed in my presence and sworn to before me this ..... day of July, 1957.

.....
Notary Public

My commission expires:

[Stamp]

[fol. 57]

EXHIBIT "E" TO ALTERNATIVE MOTION AND ANSWER

IN THE DISTRICT COURT OF RICHARDSON COUNTY NEBRASKA

Case No. 12120.

GENE DURFEE and LAURA DURFEE,

Plaintiffs,

—vs—

RALPH KEIFFER, if married ..... KEIFFER, his wife, first, real and true name unknown; RUSSELL NAUMAN, if married, ... NAUMAN, his wife, first, real and true name unknown; JOHN DOE and JANE DOE, husband and wife, real names unknown; NELLIE N. DUKE, if married, ... DUKE, her husband, first, real and true name unknown; JULIA E. DUKE, if married, ... DUKE, her husband, first, real and true name unknown,

Defendants.

DECREE

THIS MATTER came on for trial on the 27th and 28th day of May, 1958 upon the Petition of plaintiff, and the Court, being fully advised in the premises, finds that it has jurisdiction of the parties and the subject matter.

Upon leave duly granted, Laura Durfee was made an additional party plaintiff.

Upon consideration of the pleadings and the evidence, plaintiffs being present in court and represented by their counsel, August Ross and Alfred A. Fiedler, and defendants being present in court and being represented by their counsel, Wiltse & Wiltse of Falls City, Nebraska, and Pettijohn & Eiser of Oregon, Missouri, evidence received, the Court finds generally in favor of plaintiffs and against defendants.

The Court finds that the allegations contained in plaintiffs' petition are true; that the hereinafter described real

estate is situated within the State of Nebraska; that the [fol. 58] plaintiffs' title limited to the formed island and the accretions thereto lying South and West of chute, which property is more particularly described as follows, to-wit: All that part of Sections 20, 21, 22, 27 and 28 lying South and West of the middle of the chute formed by an old channel of the Missouri River all in Township 1, North, Range 18 East of the 6th P.M., in Richardson County, Nebraska, should be quieted and confirmed in the plaintiffs and against the claims of the defendants and anyone claiming by, through or under said defendants.

It Is, Therefore, Ordered, Adjudged and Decreed that plaintiffs' title to the following described real estate, to-wit: All that part of Sections 20, 21, 22, 27 and 28 lying South and West of the middle of the chute formed by an old channel of the Missouri River all in Township 1, North, Range 18 East of the 6th P.M., in Richardson County, Nebraska, be, and the same is, quieted and confirmed in plaintiffs and against the claims of the defendants, and each of them, and anyone claiming by, through or under said defendants, and said defendants be, and they are hereby, enjoined from claiming any right, title or interest in and to said described real estate; that plaintiffs have judgment against the defendants for their costs herein expended.

Dated at Falls City, Nebraska this 8 day of August, 1958.

By the Court:

/s/ Virgil Faloon
District Judge.

O. K. as to Form
Wiltse & Wiltse

[fol. 59]

EXHIBIT "F" TO ALTERNATIVE MOTION AND ANSWER

IN THE SUPREME COURT OF NEBRASKA

DURFEE

v.

KEIFFER

34523

Filed March 27, 1959.

* * * * * * * * *

[fol. 63] Heard before Simmons, C. J., Carter, Yeager, Chappell, Wenke, and Boslaugh, JJ.

SIMMONS, C. J.

This is an action to quiet title to land. As originally brought it involved a claim to land lying on both sides of an old chute in the Missouri River. At the area involved the Missouri River runs generally in an east and west direction. The land lying east and north of the chute appears to have been owned by defendant Nellie N. Duke, she having a life estate, with remainder in three children. The land lying south and west of the chute was claimed by the defendant, Julia E. Duke.

Issues were made and trial was had resulting in a decree that plaintiffs were the owners of the land involved lying south and west of the middle of the chute. Defendants appeal. There is no cross-appeal by plaintiffs. Hence the appeal here involves only the lands claimed by defendant Julia E. Duke. We, then, consider it as an appeal in an action brought against defendant Julia E. Duke, hereinafter called defendant, and her tenants.

Plaintiffs alleged in their petition the ownership of the land; that they were owners under and by virtue of a deed executed and delivered as the result of a tax foreclosure

proceeding in Richardson County; that the land was situated wholly in the State of Nebraska; that it was west of the meander line of the middle of the channel of the Missouri River as established by a United States government survey in 1855-1856; that the Missouri River by avulsion in 1916 changed its course to its present channel west and south of the land involved; and that the boundary between the states remained as it existed at the time of the 1855-1856 survey.

[fol. 64] Defendants answered and alleged that the lands were wholly in the State of Missouri and not within the jurisdiction of the court. They then denied generally, admitted possession, and claimed ownership. They prayed for a dismissal of the plaintiffs' petition.

At the trial defendant testified that she based her claim of title on a swamp land patent from the State of Missouri.

On appeal here defendant argues that she proved ownership by adverse possession. Plaintiffs contend that such a claim must be affirmatively pleaded and cannot now be raised. It does not appear that such a contention was advanced to the trial court. Defendant's testimony negatives it. Claim of ownership by adverse possession is advanced here for the first time.

The rule is: This court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. See O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

This cause is here for trial de novo subject to the rule that: In equity cases when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. See Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

Both parties here introduced a large number of aerial photographs, maps, and charts of the area where the land in dispute is located. The record is replete with the testi- [fol. 65] mony of witnesses who referred to locations of land, buildings, fences, dikes, streams, etc., by general statements of "here" and "there," and "indicated" to the trial

court the reference to the location they were testifying about. In many instances we are unable to determine with any degree of certainty to what they refer, and in some instances even the exhibits mentioned cannot be identified. Trial courts should not permit a record to be made of testimony referring to exhibits without requiring counsel and witnesses to identify for the record that about which they testify. Where such a record is made we have no recourse but to apply the above equity rule, and do so here.

It is advisable at this point to state the rules of law that are to be considered here. The parties here are not in disagreement that the boundary between Missouri and Nebraska at the time of the admission of the states to the Union was the center of the channel of the Missouri River. We have held: "'That boundary may and does fluctuate with the changes of the channel of that stream where the alteration is gradual and imperceptible; but, when by a sudden variation the stream seeks and marks for itself an entirely new course and abandons the old path, the boundary remains along the line which constituted the center of the old channel.'" Lienmann v. County of Sarpy, 145 Neb. 382, 16 N. W. 2d 725.

"Where the main channel of the river changes by accretion and decretion, the boundary between the two states follows the channel. • • • Where the main channel of the river changes by avulsion to a new course, the boundary does not change but becomes fixed along the line which [fol. 66] constituted the center of the old channel. • • • Lands cut off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they were cut off." Lienmann v. County of Sarpy, *supra*.

"Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. • • • Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land

by the lowering of the surface level from any cause. * * * Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. * * * The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. * * * Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact." Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57.

"Avulsion is the sudden and rapid change in the course and channel of a boundary river. In Nebraska v. Iowa, 143 U. S. 359, 12 S. Ct. 396, it was said: 'It is equally well [fol. 67] settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion.'" Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538.

We here refer to the banks of the Missouri River as the left bank and as the right bank, as they appear looking down stream.

We find the following factual situation from the record.

During annual flood periods the river ran over a wide area in the location in question. At normal and low water flow it followed a fairly well defined main channel.

Prior to 1855, the main channel of the Missouri River flowed some distance to the north and east of the location of the land in question. The 1855-1856 survey shows that the main channel of the river had moved west and south, but was still east and north of the land in question. The evidence is ample that thereafter the main channel of the river for many years was along the course of the "old chute"

to which witnesses refer and to which the trial court referred in its decree.

About 1887 a railroad bridge was built across the river a short distance above the area in question. The open span was near the right bank of the river. An extended dike led to the bridge on the left side of the river. The construction of the bridge had the effect of shifting the main channel of the river to the west and south. Sand bars [fol. 68] and shallow water appeared to the east and north of the new channel and west and south of the former main channel. The land involved here began as an island in that area. It grew by accretion.

At least by 1930, it was sufficiently established to be claimed by a person who quitclaimed it to a Mr. Slagle in 1932. At that time there was a defined channel west and south of the island. However, the evidence of eyewitnesses is that the main channel of the river continued its course along what is now the "old chute."

Mr. Slagle had a cabin on the island, fenced parts of it and kept livestock on it, and had an employee on it at times. He continued in possession of it until 1943, and paid taxes to Richardson County on it until 1944. In 1933 or 1934 the United States government began the work of channel control on the river. In the next few years as a result of that work the main channel of the river was moved to the west and south. As a result of silting in times of flood the island increased by accretion.

In 1943 or 1944, defendant entered upon the island from the old left bank across the old chute, burned grass and underbrush, built a fence along the chute, and undertook to do some plowing. When the river was in high water stage, water flowed through the old channel where the chute now is located. Recurring annual floods prevented much development until 1954 or 1955 when over 200 acres of land were cleared by defendant and put to crops.

If the river shifted by avulsion from its first position to the main channel as it was and where the chute now is, that shift would avail defendant nothing for the boundary between the states would remain where it was before the [fol. 69] avulsion. If, however, that moving of the channel

to the west and south was by accretion, it would avail the defendant nothing for the land here involved is not accreted land to the old left bank of the river.

We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute.

The left bank of the river did not move west and south by accretions to the river bank. Rather, as a result of the works of man and the forces of the water, the river established a new main channel to the west and south of the island.

The question is: Is the island in Missouri or Nebraska? The effect of the trial court's finding is that it is in Nebraska.

We think it patent that we cannot apply the rule of accretion to the changed course of the stream. Rather it is a situation to which the rule of avulsion applies.

In Whiteside v. Norton, 205 F. 5, 45 L.R.A.N.S. 112, the court was presented with a similar fact situation and held that the cutting of a new channel was analogous to avulsion.

In James v. State, 10 Ga. App. 13, 72 S. E. 600, the court had a somewhat similar problem to solve. The court held that there was no evidence of a change "by the sudden and violent process of avulsion," yet the act of the United States government in changing the course of a river to improve navigation was analogous to a change caused by avulsion and not by accretion, and that the boundary line was not [fol. 70] affected.

In State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782, we had a quite similar set of facts and decided this precise question by applying the rule of avulsion. We quoted with approval this language from Commissioners v. United States, 270 F. 110: "'* * * * where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during

many years by the gradual or occasional increase from year to year of the proportion of the waters of river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.'"

The above decision is controlling here. We hold that the land involved in this appeal, lying south and west of the old chute, is within the State of Nebraska; that the trial court had jurisdiction of the cause; and that defendant's swamp land patent from the State of Missouri conveyed no title to her.

This decision is not to be construed as deciding in any way the jurisdictional location of the land east and north of the old chute, as that land is not involved in this action as it comes to us here.

[fol. 71] Defendant, assuming that we might find that the land involved is in the State of Nebraska, relies on the rule that: Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary. See Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486. She contends that plaintiffs have not met their burden of proof.

Defendant here contends that the sheriff's deed under which plaintiffs claim title was void.

It is not claimed by defendant that there was any residence on the land where service at the usual place of residence could have been had. It is not claimed that defendant was a resident of Nebraska. In fact the evidence shows that she was a resident of Missouri. It is not claimed that there was anything of record in Richardson County that showed the defendant had or claimed any title or interest in this land.

The foreclosure action named the Slagles as defendants. It named John Doe and Mary Doe and all persons having or claiming to have any interest in any part of the described

real estate. As to John Doe and Mary Doe the sheriff's return showed that they were not found in Richardson County.

Defendant's claim rests upon that part of section 25-321, R. R. S. 1943, regarding service upon unknown defendants which provides: "Judgments and decrees against persons so designated and made defendants and served by publication as herein provided shall be conclusive as against all persons who are not in actual possession of such property and whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or [fol. 72] by their respective names in the county wherein such property is situated."

Defendant contends that she was in "actual possession" and hence entitled to the protection of the act. Defendant makes no charge of irregularities in the proceedings other than the above.

It is to be remembered that when defendant entered upon the land in 1943 or 1944, to the limited extent shown, she entered as a trespasser. After 1946, she claimed under and by virtue of the Missouri land patent. She made no claim to a right of possession otherwise.

The petition of foreclosure was filed August 23, 1955. The sheriff made return of service on August 26, 1955. The decree was rendered on December 15, 1955. The sale was confirmed and the deed to plaintiffs issued and recorded on February 24, 1956.

The question, then, relates to defendant's claim of possession during the above period.

As to that the evidence is extremely meager. The evidence is that there were 220 acres of growing crops on the land in 1955. Defendant testifies that she was in "possession," and received no summons or notice of the foreclosure proceedings. The nearest she comes to defining her possession is to refer to "the land I was supposed to be in the operation of."

A Mr. Keiffer testified that he started farming for defendant on this land in 1954; that "I had about 200 acres" and a good crop growing there in August 1955; and that he was not served with summons. A Mr. Nauman testified that in 1955 he "worked" for Mr. Keiffer. No one undertook

[fol. 73] to testify as to the nature of the arrangements whereby Keiffer farmed for defendant. In her brief here defendant refers to Keiffer and Nauman as "her tenants." Whether that relates to the time of the tax foreclosure action or the time the instant action was started is not certain.

Neither Keiffer nor Nauman is named as defendant in the tax foreclosure action. They are named as defendants in the instant action brought in November 1956, as parties in possession of a part of the premises. Their answer filed jointly with the Dukes admits possession and alleges ownership in the Dukes. Neither Keiffer nor Nauman is here claiming any invasion of his rights. The contention here is solely that of the defendant.

We find nothing in the record that even suggests that there was anyone resident on the land or even working on the land when this action began upon whom service of summons could be had. The sheriff's return, which imports verity, negatives any such a conclusion. There is no suggestion that anyone going to the land could have found anyone or anything there that would have suggested where inquiry could be made to determine who, if anyone, claimed any interest in the land. In fact there is no evidence as to where the defendant or her "tenants" were during the period here involved. They make no showing that they were on the land, or in the area of the land, or were either in the State of Missouri or State of Nebraska.

The defendant's position rests solely on the fact that Mr. Keiffer farmed the land for her and that there were over 200 acres of growing crops thereon.

Does that establish "actual possession" within the contemplation of the statute? What did the Legislature intend [fol. 74] when it used the term "actual possession"?

In Parsons v. Prudential Real Estate Co., 86 Neb. 271, 125 N. W. 521, 44 L.R.A.N.S. 666, where the tax laws required service of notice upon "every person in actual occupancy of" the lands, an attack was made on a tax deed upon the ground that one Parker was in "actual occupancy" of the premises and that no notice was served on him. Parker was a trespasser and did not live on the land, but cropped the ground. We accepted the following definition:

"'Occupant' * * * 'One who occupies; an inhabitant; especially, one in actual possession, as a tenant, who has actual possession, in distinction from the landlord, who has legal or constructive possession.'" We held that Parker was not an actual occupant of the land.

That decision was filed March 10, 1910. The part of the statute here involved was enacted in 1921. See Laws 1921, c. 226, s. 1, p. 815. So we had defined the term before the Legislature adopted it.

The rule is: It is to be presumed that the Legislature in using language in a statute gave to it the significance that had been previously accorded to it by the pronouncements of this court unless a different meaning has been provided by the context of the statute. See Gomez v. State ex rel. Larez, 157 Neb. 738, 61 N. W. 2d 345.

We adhered to the above definition in Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481.

We construed Parsons v. Prudential Real Estate Co., *supra*, in Kuska v. Kubat, 147 Neb. 139, 22 N. W. 2d 484. The court said: "In that case service of notice to redeem [fol. 75] was given to nonresidents only by publication, as in the case at bar. At that time there was a person in actual possession or occupancy of the property but he was a trespasser. No personal service of notice to redeem was had upon him. This court held that none was necessary. In construing the Constitution and applicable statute, it was held that 'occupants' and 'actual possession or occupancy' were synonymous and meant actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession. It was also held that the actual possession or occupancy must be by one claiming an interest in the property either in privity with or adversely to the owner as distinguished from a mere trespasser."

Defendant relies here on Harris v. Heeter, 137 Neb. 905, 291 N. W. 721, 128 A. L. R. 111. There we merely applied the rule of actual possession to the facts. The facts of that case are so dissimilar to the facts here that no comment is required.

It necessarily follows that defendant's attack upon plaintiffs' title by the tax deed has no merit.

We arrive at the same conclusion by another line of reasoning.

It will be noted that section 25-321, R. R. S. 1943, in summary requires an allegation in the petition or other pleading that there are persons who claim to have some interest in the property; that it does not appear of record; that diligent investigation and inquiry have been made; and that the person in whose behalf the investigation has been made does not know the names, whereabouts, or residence of such persons. Section 25-518, R. R. S. 1943, requires [fol. 76] an affidavit supporting the allegation. Section 25-517, R. R. S. 1943, requires a court order for service by publication after the court is satisfied that sufficient investigation has been made. It is obvious that such a procedure was intended to establish a "conclusive" record in accord with the facts shown and established to the satisfaction of the court, as against all persons except those "in actual possession" (s. 25-321, R. R. S. 1943), whose interest in the property does not appear of record.

In Draper v. Taylor, 58 Neb. 787, 79 N. W. 709, we stated this rule: Possession of land is notice to the world of the possessor's rights therein.

This holding was followed in Blum v. Voss, 139 Neb. 233, 297 N. W. 84, and Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99.

There is a companion rule stated in Talich v. Marvel, 115 Neb. 255, 212 N. W. 540, followed in Marshall v. Rowe, 126 Neb. 817, 254 N. W. 480, and Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330, which is: Where one is put upon inquiry, he is to be charged with notice of all such facts he would have learned by reasonable inquiry.

It must be assumed that the Legislature had these rules in mind in making the requirements of allegations, proof by affidavit, and court finding and order.

It is obvious that what the Legislature intended was that a party against whom such service by publication had been had could, by proof of actual possession at the time involved, disprove the truth of the showing upon which the court had [fol. 77] permitted the service by publication to be made.

The Legislature limited that right to strict compliance with proof of actual possession in the literal meaning of those words. It did not permit the opening up of the conclusive effect of the service by publication except upon a showing of that condition in fact. The showing here is patently insufficient to meet this test.

Defendant advances a further contention based upon the following from Maryland v. West Virginia, 217 U. S. 1, 30 S. Ct. 268, 54 L. Ed. 645: "Where possession of territory has been undisturbed for many years a prescriptive right arises which is equally binding under the principles of justice on States and individuals."

There again the facts are so dissimilar that we see no reason for discussing the case here.

The judgment of the trial court is affirmed.

AFFIRMED.

Messmore, J., participating on briefs.

[fol. 78] THE STATE OF NEBRASKA, ss.

I, George H. Turner, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of an opinion filed by said Court on the 27th day of March 1959 with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 27th day of March 1959.

/s/ GEO. H. TURNER
Clerk

By .....
Deputy

[fol. 79]

EXHIBIT "G" TO ALTERNATIVE MOTION AND ANSWER

MANDATE.
Form No. 1.

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

Sitting at Lincoln January Term, 1959

TO THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, sitting in and for the County of Richardson GREETING:

WHEREAS, in a late action before you, wherein Gene Durfee and Laura Durfee were plaintiffs and Ralph Keiffer, Deana Keiffer, Russell Nauman, Carolyn Nauman, Julia E. Duke, et al were defendants, a judgment was rendered by you, upon a transcript of which record and proceedings in your said Court, the said defendants prosecuted an appeal to the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court during the January Term, A. D. 1959, it was considered by said Court that the judgment rendered by you be affirmed .... at the costs of said defendants taxed at $87.40.

NOW, THEREFORE, You are commanded, without delay, to cause execution to issue carrying into effect your said judgment in the manner provided by law.

WITNESS, The Hon. Robert G. Simmons, Chief Justice, and the Seal of said Court, this 29th day of May, 1959.

GEORGE H. TURNER
Clerk

By .....
Deputy

[fol. 186] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, et al., Defendants.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW—January 23, 1961

Plaintiff, a resident of Missouri, instituted this suit against the defendants in the Circuit Court of Holt County, Missouri, on May 23, 1959, alleging that she is the owner in fee simple and in possession of the real estate described in the "Petition". (The land described by metes and bounds is quite long and consists of several hundred acres of an island in the Missouri River Bottoms, and in view of the court's determination of the case, I see no reason to set out the description here.)

The case was removed to this court by the defendants, Gene and Laura Durfee, residents of the State of Nebraska. This court has jurisdiction by virtue of nonresidency of said defendants and the amount in controversy, which exceeds the sum of $10,000.00.

[fol. 187] Plaintiff alleged that the defendants Drufee claim some right, title or interest in and to said real estate, and that the defendants Ralph Keiffer and Russell Nauman are in possession of the property as tenants of the plaintiff; that the defendant, First State Bank of Forest City, Missouri, is the beneficiary, and defendant James H. Pettijohn is the trustee of a deed of trust, and that such parties have no interest in the litigation other than that set out herein.

Plaintiff asks the court to decree that the fee simple title is in her and that the defendants be forever enjoined and restrained from asserting or claiming any right, title or interest in or to any of said property.

Plaintiff claims ownership by virtue of a Swamp Land Patent issued to her by the State of Missouri (Holt County) under the provisions of §241.220 R. S. Mo. 1949, in 1946.

The evidence reveals that the defendants Durfee obtained a sheriff's deed to the property as the result of a tax foreclosure sale by Richardson County, Nebraska. Plaintiff also claims title by adverse possession, which will be discussed hereafter.

The main channel of the Missouri River was established as the boundary between Missouri and Nebraska at the time Nebraska was admitted to the Union.

[fol. 188] It is the defendants' contention that the land in controversy is on the Nebraska side of the main channel of the Missouri River, and thus the property of the State of Nebraska.

In 1956, the defendants Durfee brought an action in the District Court of Richardson County, Nebraska, against Julia E. Duke and her tenants, to quiet title, alleging that they were the owners by virtue of the sheriff's deed, as heretofore mentioned.

The defendants in that case raised the issue of the sufficiency of the service upon them, which was overruled by that court, and they then submitted themselves to the jurisdiction of the court and joined in the trial of the issue as to whether the land in controversy was in the State of Missouri or in the State of Nebraska.

After hearing all of the evidence, the District Court made a general finding that the land was in Nebraska; that the plaintiffs were the owners thereof, and that the defendants had no right, title or interest thereto. On appeal by the defendants to the Nebraska Supreme Court, the action of the District Court was affirmed in an opinion in 95 S. W. 2d 618.

Because the District Court had not made any Findings of Fact or Conclusions of Law, the Supreme Court tried the case de novo, made its Findings of Fact and Conclusions

of Law, and also arrived at the determination that the land was in the State of Nebraska.

[fol. 189] That court fully discussed the evidence, the maps and other exhibits as a basis for its finding. There was no appeal by the defendants from the decision of the Nebraska Supreme Court to the Supreme Court of the United States. Instead the defendant there, Julia Duke, instituted this suit in the State of Missouri.

Here, the defendants raise the question of the jurisdiction of this court to hear and determine the issues, as they were determined by the Nebraska Court, and contend that the decision in the Nebraska Court is final and is entitled to full faith and credit and is res judicata.

I concur in the finding of the Nebraska court that prior to 1855, the main channel of the Missouri River flowed to the north and east of the location of the land in question here. The survey of 1855-56 shows that the main channel of the River had moved west and south of its location prior to that time, but was still east and north of the land in question.

In 1877 a railroad bridge was built across the river above the land that is now in question. The open span of the bridge was near the right bank or the Nebraska side of the river. An extended dike was constructed on the left side or the Missouri side of the river, leading to the bridge.

[fol. 190] It is contended, and I think it is true, that this work had the effect of shifting the main channel of the river to the west and south. It is probable that it was in this area that islands began to form and grow by accretion, and it was the islands and the land thus created that plaintiff testifies she remembers in the early '20s. At least by 1930, they had grown sufficiently that one Slagle in 1932 laid claim to them by virtue of a quit claim deed.

The Nebraska court found that at that time there was a defined channel west and south of the island. That court however, found that the main channel of the river continued its course along what is now the old chute.

Slagle built a cabin on the island, fenced part of it and apparently ran some livestock on it, and continued in possession until about 1943, and paid taxes to Richardson

County, Nebraska. It was shortly after Slagle obtained possession of it, (probably 1933-34) that the Government began its channel control work. Thereafter, as a result of this work, the channel of the river was moved to the west and south.

Apparently it was upon these facts that the Nebraska court determined that the change in the course of the river resulted from avulsion rather than from attrition or accretion.

In arriving at its conclusion, the Supreme Court of Nebraska in syllabus 7 which was written by the court, l. c. 620 of its opinion, said:

> [fol. 191] "The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto."

At page 624 of its opinion, that court stated:

> "We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute."

Considering the court's own statement, I think it must be assumed that prior to the cutting of what is referred to as the "new chute and channel" the main channel of the river was to the west of the island formation.

I am unable to find any evidence in the case that is convincing to me that the chute was the result of the gradual change of the course of the river. To me, the most convincing evidence is that the chute which was formed in the early '20s, was the result of avulsion occasioned by the accumulation of ice which suddenly cut a new channel, but I do not believe the evidence shows that this new chute or channel became the main channel of the river.

Following the course of the river from 1846 to the period prior to the cutting of the channel, I find no evidence of the formation of a new channel by avulsion, unless it was the

chute referred to above. If the channel was the result of avulsion, as it is my conclusion it was, and if the main [fol. 192] channel prior thereto was west of the formation of the island, then, of course, the property lines did not change nor did the boundary between Nebraska and Missouri change.

The question of ownership by adverse possession was not raised by the defendants in the Nebraska District Court, but was raised in the Supreme Court. That court held that it was bound to determine the case upon the same issues that were presented to the District Court, and, therefore, refused to consider the question of adverse possession.

In arriving at its conclusion, the Supreme Court of Nebraska found:

> "Prior to 1855, the main channel of the Missouri River flowed some distance to the north and east of the location of the land in question. The 1855-1856 survey shows that the main channel of the river had moved west and south, but was still east and north of the land in question. The evidence is ample that thereafter the main channel of the river for many years was along the course of the 'old chute' to which witnesses refer and to which the trial court referred in its decree
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> "About 1887 a railroad bridge was built across the river a short distance above the area in question. The open span was near the right bank of the river. An extended dike led to the bridge on the left side of the river. The construction of the bridge had the effect of shifting the main channel of the river to the west and south. Sand bars and shallow water appeared to the east and north of the new channel and west and south of the former main channel. The land involved here began as an island in that area. It grew by accretion.
>
> "At least by 1930, it was sufficiently established to be claimed by a person who quitclaimed it to a Mr. Slagle in 1932. At that time there was a defined channel west and south of the island. However, the evidence of eyewitnesses is that the main channel of the river continued its course along what is now the 'old chute'.

[fol. 193] "Mr. Slagle had a cabin on the island, fenced parts of it and kept livestock on it, and had an employee on it at times. He continued in possession of it until 1943, and paid taxes to Richardson County, on it until 1944. In 1933 or 1934 the United States government began the work of channel control on the river. In the next few years as a result of that work the main channel of the river was moved to the west and south. As a result of silting in times of flood the island increased by accretion.

"In 1943 or 1944, the defendant entered upon the island from the old left bank across the old chute, burned grass and underbrush, built a fence along the chute, and undertook to do some plowing. When the river was in high water stage, water flowed through the old channel where the chute now is located. Recurring annual floods prevented much development until 1954 or 1955 when over 200 acres of land were cleared by defendant and put to crops.

"If the river shifted by avulsion from its first position to the main channel as it was and where the chute now is, that shift would avail defendant nothing for the boundary between the states would remain where it was before the avulsion. If, however, that moving of the channel to the west and south was by accretion, it would avail the defendant nothing for the land here involved is not accreted land to the old left bank of the river.

"We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute.

"The left bank of the river did not move west and south by accretions to the river bank. Rather, as a result of the works of man and the forces of the water, the river established a new main channel to the west and south of the island.

"The question is: Is the island in Missouri or Nebraska?

"The effect of the trial court's finding is that it is in Nebraska.

[fol. 194] "We think it patent that we cannot apply the rule of accretion to the changed course of the stream. Rather it is a situation to which the rule of avulsion applies."

The question of res judicata was timely raised by the defendants by Motions to Dismiss in this court, and were by this court overruled before the case came on for trial.

It is plaintiff's contention that the question of jurisdiction may be raised at any time, and that the factual situation as to whether or not the land is actually in Nebraska or Missouri would determine the question of the jurisdiction of this court regardless of any Findings of Fact or Conclusions of Law reached by the Nebraska courts in the former trial.

At the time the Motion to Dismiss was determined by the court, it was felt that the whole matter should be presented to the court so that it could make such decision as it felt necessary to a full and complete determination both of the question of jurisdiction and the question of fact.

The decisions of the state and national courts involving the title to lands along the Missouri River and islands therein, are so numerous that they fill many volumes. Such questions are always troublesome to the courts, although the principles of law involved are well settled.

[fol. 195] Before it was subdued, the Missouri River was the greatest outlaw the West has ever known. It was as nomadic as the tribes that lived along its banks and gave it its name. It was no respecter of persons or property. It often took from those who had and gave to those who had not; it often took from the poor and gave to the well-to-do.

When we attempt to determine where the channel was from year to year prior to the period when the channel stabilization program began, we must rely upon the memory of man to a very large degree, and, of course, the memory of man is often faulty and fades with time, and no two pairs of eyes see the same thing in the same way, although they may be equally honest in their attempt to describe that which actually exists.

Islands are formed in the Missouri River during one high water period and taken away in another. They are moved from one place to another, sometimes slowly, sometimes over night. Land and islands may be created by accretion, by avulsion or by attrition. There is no dispute about the legal principle that when the river suddenly changes its channel or its course, the property lines existing prior thereto are not affected, and that includes the boundaries between these states. If the main channel of the river changes by attrition or as the result of erosion, the boundary follows the course of the river.

[fol. 196] It was not until the Corps of Engineers of the United States Army began the work of controlling the channel of the Missouri River for navigation purposes and later for flood control purposes, that its course had any stability. Since that time it has reasonably been confined within the areas charted by the engineers.

The history of the land in question goes back to as early as 1916, when the father of the plaintiff first acquired the land of which the land in question is now a part. Plaintiff testified that her father had acquired a part of the land in 1916 by purchase; that she remembered in the early '20s that there was land south and west of her father's land; that as a schild she remembered having walked out on that land.

A portion of a cottonwood tree was introduced in evidence at the time of this case, which the plaintiff testifies was cut on the land in controversy in 1959. The state forester of Missouri testified that the tree was at least 35 years old, which indicated that the land, at least some portion of it, had existed with sufficient permanency to support the growth of shrubbery and trees for that many years. Plaintiff further testifies that her father from time to time had livestock on a portion of the land in controversy.

Plaintiff remembers when the chute was formed in the mid-'20s. She says the river cut-through was caused by an ice gorge. She remembers her father's attempt to sta-
[fol. 197] bilize the bank of the river at the place where the chute cut through. She further testifies that as a result of the cutting through, approximately 100 acres of her father's

land was cut away, because thereafter that amount was removed from the tax rolls in Holt County, Missouri.

To me, the evidence clearly reveals that prior to the cut-through and the formation of the chute, the main channel was to the south and west of the land in controversy.

Some time in the early '30s the Government began its work of stabilizing the Missouri River by placing revetments and whatever other types of engineering devices the particular nature and character of the work required. These dikes started on the Missouri side of the river and extended through the plaintiff's land, and plaintiff says to the main channel of the river. Thereafter there was a gradual closing of the chute.

In 1943, the plaintiff began to use a portion of the land' she caused a portion of it to be burned off and a portion of it was cultivated, but it was not until 1946 that she acquired the deed which has heretofore been described. In 1946, she bought a bulldozer and started building a crossing across the chute. From year to year thereafter plaintiff continued to put forth such effort as the season would permit, to bring additional portions of the land under cultivation.

[fol. 123] Naturally, the extent of the high water would determine the extent she was able to carry on these activities. The nature of the season and the extent of the high water would also determine the rapidity with which the chute was filled up. Whether or not this chute was ever the main channel of the river, is, of course, the principal question in this controversy.

Assuming that prior to the cutting of the chute the main channel and the boundary line between the states were to the south and west of the land in controversy, the sudden cutting of the chute, even if it created a new main channel, would not have changed the line, because it was by avulsion and did not affect property lines.

It is a matter of common knowledge among those who have lived along the river, that islands rise from season to season, and may shift from season to season, depending upon the amount of high water, and, as one of the expert witnesses expressed it, the result of numerous "flows" or

"currents" which may not constitute the main channel of the river.

The evidence revealed that there are many currents and cross-currents in the Missouri River, but not necessarily are such currents or cross-currents the main channel of the river. They do, however, materially affect the development and the building of islands and the cutting of minor chutes through an island. At one season of the year there may be a chute through an island, and at another season and after a period of high water the chute may have completely dis- [fol. 199] appeared. As the island increases in size and height and vegetation begins to grow upon it, it gathers more sediment, mud and silt, thus becoming more secure and develops with much greater rapidity.

Certainly if the area which constituted the chute was the main channel and was caused to fill up gradually because of the building of the revetments by the Army Engineers, it did not suddenly change its course. Whether or not the river changes its channel gradually or suddenly as the result of the engineering efforts of man, does not affect property rights or the line between the states. If the channel of the river was caused to move slowly because of the revetments, the property lines would follow it. If it was caused to move suddenly, they would not follow it.

I have carefully reviewed the evidence that was introduced in the Nebraska court and in this court, including the two experts who have had much experience in construction work on the Missouri River, and I am convinced that the evidence clearly shows that prior to the formation of the island in controversy, the main channel of the river was to the south and west thereof.

With due respect to the learned gentlemen on the Nebraska courts for whom I have the most profound respect, I am unable to agree with them that the chute became the main channel. But, if it did become the main channel, it was by avulsion and did not affect the boundary line. [fol. 200] There is no contention in this case that the land formerly acquired by the plaintiff's father and now belonging to her mother, is on the Nebraska side of the river, and if that is true, it is difficult for me to understand how, under all the evidence, that the land in controversy is, or was at

the time the issue was determined by that court, in Nebraska.

During a long period of time both states apparently exercised jurisdiction over the land; the prosecuting attorneys of both states exercised jurisdiction over it; the alleged Nebraska owners did not exercise any supervision or occupancy of the land from the late '30s or early '40s until this suit was brought in 1959, and plaintiff was in unquestioned, undisputed possession of the land from 1943 until the present time.

It is my definite conclusion that under all the evidence in this case, the land was located in Missouri at the time plaintiff acquired her deed under the Swamp Land Title Act. Notwithstanding my conclusion that the land is located in Missouri, I am convinced that under the law this court has no jurisdiction to determine that question, and it is with much reluctance that I must conclude that the Nebraska decision is res judicata and determinative of the whole question of location and ownership.

If the defendant had not litigated the subject of the location of the land and her right to the possession and ownership thereof in the Nebraska court, I think there would have been no question about the right of this court to hear and de- [fol. 201] termine that issue, but that is not the fact. The parties submitted themselves as well as their cause to that court. The question has been before the courts both state and national many times and involving many types of situations both as to individuals and property.

There is a very significant statement in the Commentaries by Mr. Justice Story quoted in *Grover & Baker Machine Co.* v. *Radcliffe*, 137 U. S. l. c. 296, that:

> " • • • 'no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals;' • • • 'Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to

remain as independent of each other, for all but national purposes, as they were before the revolution."

Reading this quotation from the Commentaries of a great jurist in an abstract manner might lead one to say that the principle there expressed is applicable here and would confer power upon this court to again hear and determine the question for itself. But, when we read it in connection with the many decisions on the subject, it takes on a different meaning. For example, it was said in *Baldwin* v. *Iowa State Traveling Men's Assoc.*, 283 U. S. 522 at 525, 526:

[fol. 202] " * * * The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. (Citations omitted). It had also the right to appeal from the decision of the Missouri District Court, * * * It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

I am not unmindful of the language of the court in *Treines* v. *Sunshine Mining Co.*, 308 U. S. 66, in which the

question of jurisdiction was extensively discussed, but I think a careful reading of that opinion clearly indicates that the question of jurisdiction was not determined in the Washington court, and that if it had been so determined, it would have been *res judicata* because the court says:

> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties."

[fol. 203] All of the issues that are now before this court, except that of ownership by adverse possession, were tried by the Nebraska court, with all of the parties present contesting those issues, and while the question of jurisdiction of a *res* may be re-litigated by a second court, [Thompson v. Whitman, 18 Wall. 457] yet this right is limited in its application to cases where the jurisdictional point was not litigated in the first suit. *Adam* v. *Saenger*, 303 U. S. 62; *Berkman* v. *Ann Lewis Shops*, 246 F. 2d 44, 47.

Although it is my belief that the evidence clearly reveals that the land lies in Missouri, yet a trial of that very issue, with all of the parties present in the Nebraska court is now binding upon this court, and precludes it from again decreeing the ownership of the land, and that the finding and judgment must be against the plaintiff on that account only.

The defendants have filed a counterclaim asking for an accounting of the profits derived by the plaintiff as a result of use of the land. Having determined that this court is without jurisdiction to determine the question of the ownership of the property, I think this court is without jurisdiction to determine this question. However, if I were to determine the issue, I would say most definitely that the amount of money which has been expended by the plaintiff in bringing the land to a state of cultivation far exceeds the amount of profit she has derived therefrom, and that she would not be liable to the defendants for any sum.

R. M. Duncan, Judge.

Dated: January 23, 1961.

[fol. 204] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, et al., Defendants.

ORDER CORRECTING "MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW"—Filed January 26, 1961

The "Memorandum Opinion, Findings of Fact, and Conclusions of Law" heretofore filed and entered in this cause, is hereby corrected as follows:

On page 2, line 1, the name of the defendants "Drufee" is corrected to read "Durfee".

On page 3, the citation in the last line of the fourth paragraph which reads "95 S. W. 2d 618" is corrected to read "95 N. W. 2d 618".

On page 10, in the fourth line, the letter "k" is ordered stricken.

On Page 11, the last line of the second paragraph the word "schild" is corrected to read "child".

On page 12, seventh line from the bottom after the word "land" the apostrophe is ordered stricken, and a semi-colon ordered to appear after said word "land".

Otherwise, said Memorandum Opinion, Findings of Fact and Conclusions shall remain as filed and entered.

R. M. Duncan, Judge.

[fol. 205] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, Defendants.

DECREE—February 9, 1961

This Matter came on for trial on the 31st day of May, 1960 upon the Petition of the plaintiff and the Answer and Cross-Complaint of the defendants, Gene Durfee and Laura Durfee, and the Court, being fully advised in the premises, finds:

That plaintiff, a resident of Missouri, instituted this Suit against the defendants, Gene Durfee and Laura Durfee, in the Circuit Court of Holt County, Missouri, on May 23, 1959, alleging that she is the owner in fee simple and in possession of the following described real estate, to-wit:

Commencing 6.66 chains South and 6.96 chains East of the Quarter Section Corner between Sections Ten (10) and Eleven (11), in Township Sixty (60) North, of Range Forty (40) West; thence North 76° 35′ West 3.40 chains; thence North 84° 5′ West 3.97 chains; thence North 78° 35′ West 4.96 chains; thence North 83° 20′ West 7.65 chains; thence North 76° 35′ West 5.22 chains; thence North 82° 15′ West 4.364 chains; thence North 81° 15′ West 3.76 chains to a point 86 links South of the center of Section Ten (10), said Township and Range; thence South 32.59 chains to the left bank of the Missouri River; thence North 71° East

17.03 chains; thence North 86° East 2.82 chains; thence North 80° East 6.00 chains; thence North 75.5° East 8.48 chains; thence North 17.89 chains to the point of beginning, containing 81.65 acres, more or less.

Commencing 86 links South of the center of Section Ten (10), in Township Sixty (60) North, of Range Forty (40) West; thence North 81° 15′ West 3.27 chains; thence North 77° 45′ West 2.40 chains to the line East and West through the center of said Section Ten (10); [fol. 206] thence West 34.42 chains to the Quarter Section corner between Sections Nine (9) and Ten (10), said Township and Range; thence South 40.00 chains to the Southwest corner of said Section Ten (10); thence East 21.51 chains; thence North 73.5° East 7.53 chains; thence North 68° East 10.00 chains; thence North 71° East 2.12 chains; thence North 32.59 chains to the point of beginning, containing 153.81 acres, more or less.

Commencing at the Northwest corner of Section Fifteen (15), in Township Sixty (60) North, of Range Forty (40) West; thence East 21.51 chains; thence South 73.5° West 11.57 chains; thence South 78° West 7.45 chains; thence North 79.75° West 3.18 chains; thence North 4.21 chains to the point of beginning, containing 6.17 acres, more or less.

Commencing at the Northeast corner of Section Sixteen (16), in Township Sixty (60) North, of Range Forty (40) West; thence South 4.21 chains; thence North 79.75° West 1.67 chains; thence South 77.25° West 3.50 chains; thence South 89.25° West 2.86 chains; thence North 77.5° West 10.57 chains; thence North 81.75° West 7.40 chains; thence North 76.75° West 6.00 chains; thence East 31.41 chains to the point of beginning, containing 8.98 acres, more or less.

Commencing at the Quarter Section corner between Sections Nine (9) and Ten (10), in Township Sixty (60) North, of Range Forty (40) West; thence South 40.00 chains; thence West 31.41 chains; thence North 76.75° West 4.11 chains; thence North 64.75° West

3.59 chains; thence North 53.75° West 1.67 chains; thence North 36.53 chains to the center of Section Nine (9), said Township and Range; thence East 40.00 chains to the point of beginning, containing 158.88 acres, more or less.

Commencing at the center of Section Nine (9), in Township Sixty (60) North, of Range Forty (40) West; thence South 36.53 chains; thence North 53.75° West 5.66 chains; thence North 60.75° West 14.86 chains; thence North 57° West 11.57 chains; thence North 66° West 12.40 chains; thence North 54° West 1.78 chains; thence North 13.53 chains to the Quarter Section corner between Sections Eight (8) and Nine (9), said Township and Range; thence East 40.00 chains to the point of beginning, containing 97.70 acres, more or less.

Commencing at the Quarter Section corner between Sections Eight (8) and Nine (9), in Township Sixty (60) North, of Range Forty (40) West; thence South 13.53 chains; thence North 54° West 1.60 chains; thence North 44.25° West 17.67 chains to the Half Section line East and West through Section Eight (8), said Township and Range; thence East 13.63 chains to the point of beginning, containing 9.47 acres, more or less.

[fol. 207] Commencing at the Quarter Section corner between Sections Eight (8) and Nine (9), in Township Sixty (60) North, of Range Forty (40) West; thence West 13.63 chains; thence North 44.25° West 6.33 chains; thence North 51.25° West 10.00 chains; thence North 42.75° West 11.95 chains; thence North 12.5° West 5.21 chains; thence North 15° West 15.83 chains to the Section line between Sections Five (5) and Eight (8), said Township and Range; thence East 25.08 chains; thence South 34° 35′ East 1.84 chains; thence South 57° 30′ East 7.328 chains; thence South 59° 5′ East 4.48 chains; thence South 68° 15′ East 3.34 chains to the Section line between Sections Eight (8) and Nine (9), said Township and Range; thence South 31.02 chains to the point of beginning, containing 114.25 acres, more or less.

Commencing at the Quarter Section corner between Sections Nine (9) and Ten (10), in Township Sixty (60) North, of Range Forty (40) West; thence East 34.42 chains; thence North 77° 45′ West 4.00 chains; thence North 81° 20′ West 8.72 chains; thence North 87° 40′ West 4.45 chains; thence North 88° 3′ West 3.31 chains; thence North 81° 15′ West 1.84 chains; thence North 80° 10′ West 1.95 chains; thence North 78° 10′ West 6.35 chains; thence North 50° 00′ West 5.45 chains to the Section line between Sections Nine (9) and Ten (10), said Township and Range; thence South 7.88 chains to the point of beginning, containing 9.18 acres, more or less.

Commencing at the Quarter Section corner between Sections Nine (9) and Ten (10), in Township Sixty (60) North, of Range Forty (40) West; thence North 7.88 chains; thence North 78° 5′ West 5.87 chains; thence North 87° 15′ West 11.51 chains; thence North 84° 15′ West 10.197 chains; thence North 73° 15′ West 13.358 chains; thence South 13.95 chains to the center of Section Nine (9), said Township and Range; thence East 40.00 chains to the point of beginning, containing 41.64 acres, more or less.

Commencing at the center of Section Nine (9), in Township Sixty (60) North, of Range Forty (40) West; thence North 13.95 chains; thence North 73° 15′ West 5.63 chains; thence North 73° 25′ West 6.95 chains; thence North 67° 45′ West 8.70 chains; thence North 65° 50′ West 3.15 chains; thence North 63° 45′ West 2.63 chains; thence North 65° 35′ West 6.27 chains; thence North 68° 10′ West 7.70 chains; thence North 66° 10′ West 4.08 chains to the Section line between Eight (8) and Nine (9), said Township and Range; thence South 31.02 chains to the Quarter Section corner between Sections Eight (8) and Nine (9); thence East 40.00 chains to the point of beginning, containing 88.67 acres, more or less.

[fol. 208] and prayed for a Decree of this Court quieting said title and enjoining the defendants, Gene Durfee and

Laura Durfee, from asserting or claiming any title thereto; that the defendants, Gene Durfee and Laura Durfee, denied plaintiff's title and assert ownership thereto in themselves and alleged that said issue has been adjudicated by the District Court of Richardson County, Nebraska, which adjudication constitutes res adjudicata; said defendants further cross-complain for an accounting of profits from plaintiff for use of the land.

That the case was removed to this Court by the defendants, Gene Durfee and Laura Durfee, residents of the State of Nebraska. That this Court has jurisdiction by virtue of the non-residency of said defendants and the amount in controversy, which exceeds the sum of $10,000.00.

Upon consideration of the pleadings and the evidence, the Court finds that on or about the 11th day of November, 1956, Gene Durfee and Laura Durfee, the defendants in this action, instituted as plaintiffs, an action in the District Court of Richardson County, Nebraska, a Court of general jurisdiction, the general nature and object of said action being to try, determine and quiet the title to the real estate which was described as:

> "All that part of Sections Twenty (20), Twenty-One (21), Twenty-Two (22), Twenty-Seven (27), and Twenty-Eight (28) lying South and West of the middle of the chute formed by an old channel of the Missouri River, all in Township One (1) North, Range Eighteen (18), East of the 6th P.M., in Richardson County, Nebraska",

and that the plaintiff herein, namely, Julia E. Duke, was duly named a defendant in said action in Richardson County, Nebraska and served with process therein, and submitted herself to the jurisdiction of said District Court of Richardson County, Nebraska, and joined in the trial of the issue of whether or not the land in controversy was in the State of Missouri or in the State of Nebraska, said land as described in the Richardson County action, being the same land, but otherwise described, as the land in-
[fol. 209] volved in the action instituted by Julia E. Duke, plaintiff herein; that the said Julia E. Duke raised the issue

of the jurisdiction of the District Court of Richardson County, Nebraska to determine said cause upon the contention that said land was situated within the State of Missouri, and after hearing all of the evidence, the District Court of Richardson County, Nebraska made a general finding that the land was in Nebraska, that the plaintiffs therein, Gene Durfee and Laura Durfee, husband and wife, being the defendants herein, were the owners thereof, and that Julia E. Duke had no right, title or interest thereto; that the said Julia E. Duke prosecuted an appeal to the Supreme Court of the State of Nebraska from said determination by the District Court of Richardson County, Nebraska, and on said appeal, the Supreme Court for the State of Nebraska affirmed the action of the District Court of Richardson County, Nebraska; that said determination has become final, no further appeal being taken therefrom.

That the defendants, Gene Durfee and Laura Durfee, husband and wife, have timely raised the issue of res adjudicata, and it was stipulated at the pre-trial of this cause that the parties hereto are the same parties who were involved in the action instituted in the District Court of Richardson County, Nebraska; that the land involved in this action is the same land which was involved in the action instituted in the District Court of Richardson County, Nebraska.

That the plaintiff in this action, Julia E. Duke, specifically challenged the jurisdiction of the Nebraska Court in the Nebraska action and contended therein that said land was situated within the State of Missouri, and that the said Nebraska Court specifically determined that it had jurisdiction of the subject matter and determined that said land was situated within the State of Nebraska; that the Ne- [fol. 210] braska Court quieted the title to said land in Gene Durfee and Laura Durfee, and against the claims of the defendant therein, plaintiff herein, Julia E. Duke, and that said determination is now binding upon this Court and precludes it from redetermining the issue of ownership of said land; and that the finding and judgment must be against plaintiff herein on that account.

The Court further finds that the Cross-Complaint of the defendants, Gene Durfee and Laura Durfee, husband and wife, should be dismissed.

The Court's Memorandum Opinion, Findings of Fact and Conclusions of Law, filed herein on January 24, 1961, are made a part hereof.

It Is Therefore Ordered, Adjudged and Decreed that the Petition of the plaintiff be, and the same is hereby dismissed with prejudice.

It Is Further Ordered, Adjudged and Decreed that the Cross-Complaint of the defendants, Gene Durfee and Laura Durfee, husband and wife, be, and the same is hereby dismissed with prejudice.

It Is Further Ordered that the costs be taxed against the plaintiff and that execution issue therefor.

Richard M. Duncan, Judge.

Dated: February 9, 1961

[fol. 211] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

[Title omitted]

NOTICE OF APPEAL—Filed February 21, 1961

Notice is hereby given that Julia E. Duke, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the judgment entered in this action on February 10, 1961 with the exception that no appeal is taken from that part of the judgment dismissing the Cross Complaint of the defendants Gene Durfee and Laura Durfee.

John Wiltse, Wiltse & Wiltse, 1622 Stone Street, Falls City, Nebraska, Telephone: 3919.

Robt. Brown, Brown, Douglas and Brown, Tootle-Enright Nat'l Bank Bldg., St. Joseph, Missouri, Telephone: ADams 2-7749, Attorneys for Plaintiff.

February 20, 1961

Copy mailed to:

Messrs. Kranitz & Kranitz, 714½ Francis Street, St. Joseph, Missouri, Attorneys for Defendants.

[fol. 218] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

[Title omitted]

ORDER EXTENDING TIME FOR APPEAL—Filed April 25, 1961

The motion of the plaintiff for an extension of time within which to perfect her appeal having been considered, the time within which to perfect her appeal is hereby extended to May 14, 1961.

R. M. Duncan, District Judge.

[fol. 329] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 330]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 16,763

Appeal from the United States District Court for the Western District of Missouri.

JULIA E. DUKE, Appellant,

v.

GENE DURFEE and LAURA DURFEE, Appellees.

No. 16,764

Appeal from the United States District Court for the Western District of Missouri.

GENE DURFEE and LAURA DURFEE, Appellants,

v.

JULIA E. DUKE, Appellee.

OPINION—September 18, 1962

Before Vogel, Blackmun and Ridge, Circuit Judges.

Blackmun, Circuit Judge.

This action is another chapter in a controversy over several hundred acres of land, once an island, in the Missouri River bottoms a short distance east and south of [fol. 331] Rulo, Nebraska, and west and south of Fortesque,

Missouri. It comes to us by way of appeals from a judgment dismissing the plaintiff's petition and the defendants' cross-complaint.

The basic factual situation is not untypical of these riverland title controversies yet the case admittedly presents not only simple and rather classical facts but issues which appear to possess some first impression aspects in the areas of conflict of laws and res judicata.

The middle of the main channel of the Missouri River forms the boundary between Nebraska and Missouri. Nebraska Enabling Act of April 19, 1864, 13 Stat. 47, § 2. Missouri Enabling Act of March 6, 1820, 3 Stat. 545, § 2, and the Missouri Constitution of 1820, Article I, as amended in 1834 by the Missouri Eighth General Assembly, and as affected by the Congressional Act of June 7, 1836, known as "The Platte Purchase", 5 Stat. 34, and the activating Presidential Proclamation of March 28, 1837. See *St. Joseph & G. I. R. R.* v. *Devereux*, C.C., D. Kansas, 1889, 41 F. 14, 15, and *Cooley* v. *Golden*, 1893, 52 Mo. App. 229, 232-3.

Near the land in question the river flows generally from west to east. At the present time the land lies on the north and east side of the river. However, prior to 1855, as disclosed by a survey of that year, the river's main channel was to the north and east of the land so that, if the channel still lay in that direction by 1867 when Nebraska was admitted to the Union, it was then clearly within the State of Nebraska. Patents covering the land were issued by the General Land Office of the United States in 1860 and filed some years later with the Register of Deeds of Richardson County, Nebraska.

[fol. 332] The plaintiff, Julia E. Duke, a citizen of Missouri, claims title to the land through a Holt County, Missouri, swamp land patent issued to her in 1946 pursuant to V.A.M.S. § 241.220. The defendants, Gene Durfee and Laura, his wife, citizens of Nebraska, claim title to the land under a Richardson County, Nebraska, sheriff's tax foreclosure sale deed issued to them in 1956 pursuant to R.R.S. Nebraska 1943, § 77-1913. Julia asserts that the land is Missouri land and is thus hers by the Missouri

patent. The Durfees assert that the land is Nebraska land and is thus theirs by the Nebraska sheriff's deed.

In 1956 the Durfees instituted an action to quiet title. This suit was brought in the District Court of Richardson County, Nebraska. Julia and her tenants were named as defendants. They appeared in the litigation. They filed an answer which, in addition to a general denial, contained an admission of possession, a claim of ownership, and an allegation that the land was in Missouri and not within the jurisdiction of the Nebraska court. Julia also testified in that proceeding. The Nebraska court found that it had jurisdiction of both the parties and the subject matter and that the land was in Nebraska, and quieted title in the Durfees as its owners. Julia and her tenants appealed to the Supreme Court of Nebraska. Inasmuch as the matter sounded in equity, that court tried the case de novo. R.R.S. Nebraska 1943, § 25-1925; *Dartmouth College* v. *Rose*, 1961, 172 Neb. 764, 112 N.W.2d 256, 265; *Heider* v. *Kautz*, 1957, 165 Neb. 649, 87 N.W.2d 226, 228. It affirmed the judgment for the Durfees. *Durfee* v. *Keiffer*, 1959, 168 Neb. 272, 95 N.W.2d 618. There was no attempt to bring the case to the Supreme Court of the United States.

In 1959 Julia instituted the present title action in the Circuit Court of Holt County, Missouri. Service on the [fol. 323] Durfees was effected by mail pursuant to V.A.M.S. § 506.160. The Durfees removed the suit to federal court. Their answer contained a general denial and asserted, as an affirmative defense, that the Nebraska proceedings were res judicata. The Durfees also filed a cross complaint alleging trespass and the harvesting of crops upon the land and seeking damages and an injunction. A petition of the State of Missouri to appear as amicus curiae was granted.

At the trial to the court the Nebraska record was introduced along with other evidence. The court wrote a memorandum in which it reviewed the applicable real property law. It concluded, contrary to the Nebraska result, that the land was in Missouri. It did so on the theory that the main channel of the river had worked its

way by accretion to the south and west; that it was off to the south and west prior to the formation of the island and land in question; and that, by the time Julia acquired her Missouri patent, the land was in that state. Despite this conclusion the district court "with much reluctance" dismissed Julia's complaint on the ground that the matter was res judicata because of the earlier resolution of the identical question by the Nebraska courts. It also dismissed the cross complaint because it felt that it must fall with the main action.

The Durfee position here is that the issue before us is simply res judicata. The Durfees claim that the Nebraska litigation in which Julia actively participated involved the same parties, the same subject matter, essentially the same evidence, and the same question for determination; that the jurisdiction issue was concededly litigated there and was decided adversely to Julia; and that the principle of res judicata applies to a jurisdictional determination as [fol. 334] well as to a non-jurisdictional one. They also point out that everyone agrees that the land was originally in Nebraska and they urge that Julia has not sustained the burden, which is hers, of showing the shifting of the Missouri River center channel, and hence the state line, to the south and west by accretion. They claim finally that their cross complaint stands on its own feet and does not fall with the main action. There is a suggestion that the Nebraska judgment is entitled to the protection and benefit of the full faith and credit clause of Article IV, § 1, of the Constitution.

Julia takes the position that the Nebraska court did not have jurisdiction of the land as subject-matter; that, even though she appeared in the Nebraska proceedings and raised and litigated the question of jurisdiction, she is not bound by the decision of the courts of that state, ~~that~~, inasmuch as it is subject-matter jurisdiction, and not jurisdiction of the person, which is here involved, the Nebraska judgment is open to collateral inquiry; that in the federal trial new additional evidence was presented; and that the federal district court, having found that the land was Missouri land, must quiet its title in Julia.

It is to be noted at the outset that this case at least appears to present a conflict between two established legal principles. The first is that

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal [fol. 335] to which he has submitted his cause." *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U.S. 522, 525-6.

The second is that

> "• • • every State possesses exclusive jurisdiction and sovereignty over • • • property within its territory. • • • The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over • • • property without its territory. • • • 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such • • • property in any other tribunals.' Story, Confl. Laws, sect. 539." *Pennoyer* v. *Neff*, 1877, 95 U.S. 714, 722-3,

and that jurisdiction over real estate outside a state's boundary cannot be conferred upon a court of the state by consent of the parties.

We first dispose of the full faith and credit suggestion. Under this constitutional clause and the implementing statute, 28 U.S.C. § 1738, each state must accord to a judgment rendered in a sister state the conclusiveness that judgment enjoys in the state of rendition. This has been described by the Supreme Court as a rule of evidence, *Wisconsin* v. *Pelican Ins. Co.*, 1888, 127 U.S. 265, 291-2, and as one making "• • • the local doctrines of *res judi-*

cata, speaking generally, become a part of national jurisprudence * * *". *Riley* v. *New York Trust Co.*, 1942, 315 U.S. 343, 349. It is clearly established, however, that the full faith and credit clause, while foreclosing repetitious litigation of non-jurisdictional matters, does not preclude a second forum's inquiry into questions of the first court's personal or subject-matter jurisdiction. This was the holding of several early Supreme Court cases. The principle was comprehensively restated in the usually cited [fol. 336] case of *Thompson* v. *Whitman*, 1874, 85 U.S. (18 Wall.) 457, 469, and has been perpetuated by later cases including *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 1890, 137 U.S. 287; *Adam* v. *Saenger*, 1938, 303 U.S. 59; *Milliken* v. *Meyer*, 1940, 311 U.S. 457; and *Western Union Telegraph Co.* v. *Pennsylvania*, 1961, 368 U.S. 71, 75. Thus, there is no full faith and credit requirement that, in the case before us, a Missouri court—and thereby the federal district court in Missouri, see *Angel* v. *Bullington*, 1947, 330 U.S. 183, 186-7—must accept the Nebraska judgment as final. The district court here did not violate this principle for it based its decision, not on full faith and credit, but upon res judicata.

The question of the conclusiveness of a jurisdictional determination under the res judicata principle is much more complex than the corresponding problem raised by the full faith and credit issue. To begin with, matters of personal jurisdiction and those of subject-matter jurisdiction have not received identical treatment. Thus, as to the former, where a defendant appears in the first action and litigates the question of the court's jurisdiction over his person, the ensuing judgment is held to be res judicata and not subject to collateral attack in another forum. *Chicago Life Ins. Co.* v. *Cherry*, 1917, 244 U.S. 25; *Baldwin* v. *Iowa State Traveling Men's Association*, supra, pp. 524-5 of 283 U.S. (special appearance); *American Surety Co.* v. *Baldwin*, 1932, 287 U.S. 156 (general appearance); Restatement of the Law of Judgments, § 9; Restatement of the Law of Conflict of Laws (1948 Supp.) § 451(1).[1]

[1] The result is otherwise where the judgment in the first action is obtained by default and without litigation of the issue of personal

[fol. 337] On the other hand, the answer, under the decided cases, to the parallel problem of conclusiveness of a prior determination of subject-matter jurisdiction, as distinguished from jurisdiction over the person, is not nearly so clear. The Supreme Court at different times has stated that the res judicata principle is both (a) applicable to determinations of subject-matter jurisdiction and (b) does not preclude a collateral inquiry into a court's assumption of subject-matter jurisdiction. The court's holdings disclose the same apparent inconsistency and are further clouded by generalizations going both ways. As a result the formulation of a governing rule is difficult. In order to ascertain the present status of the law we indulge in a chronological review of the Supreme Court cases:

(a) The earliest opinions of the court—concerned primarily with the disposition of real property—held or stated that the element of subject-matter jurisdiction, essential to a court's competency or power, could be inquired into collaterally. *Elliott* v. *Peirsol's Lessees*, 1828, 26 U.S. (1 Pet.) 328, 340-1; *Wilcox* v. *Jackson*, 1839, 38 U.S. (13 Pet.) 498, 511; *Hickey's Lessee* v. *Stewart*, 1845, 44 U.S. (3 How.) 750, 762-3; *Williamson* v. *Berry*, 1850, 49 U.S. (8 How.) 495, 540-3; *Boswell's Lessee* v. *Otis*, 1850, 50 U.S. (9 How.) 336. The inquiry was clearly limited to the jurisdictional question. *Thompson* v. *Tolmie*, 1829, 27 U.S. (2 Pet.) 157, 169; *Voorhees* v. *Jackson*, 1836, 35 U.S. (10 Pet.) 449, 478. This approach, by way of exception to the res judicata concept, continued apparently unquestioned until almost the end of the nineteenth century. Thus, by way of dictum, the court said in *Noble* v. *Union River Logging R. R.*, 1893, 147 U.S. 165, 173:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to [fol. 338] the validity of the proceedings, and without which the act of the court is a mere nullity; such, for

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jurisdiction. Then collateral inquiry may be made as to the first court's jurisdiction of the person of the defendant. *Baldwin* v. *Iowa State Traveling Men's Association*, *supra*, p. 525 of 283 U.S.

example, as * * * the seizure and possession of the *res* within the bailiwick in a proceeding *in rem* * * *. In these and similar cases the action of the court * * * fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding."

(b) Then the case of *Forsyth* v. *Hammond*, 1897, 166 U.S. 506, was decided. There, although the facts were not multi-state, the Court refers to the res judicata principle in the broadest terms. The city sought to annex the plaintiff's property which adjoined the city but was outside its limits. The plaintiff unsuccessfully appealed the trial court's approval of the annexation to the state supreme court. She then instituted a federal court injunction action. The Supreme Court held that the matter was res judicata and said, pp. 517-8 of 166 U.S.:

"But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have the claim established. She invoked the jurisdiction of that court. She * * * there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? * * * [A] decision by a court of competent jurisdiction in respect to any essential fact or question in the one [fol. 339] action is conclusive between the parties in all subsequent actions."

The court went on to emphasize what it called "another aspect of this case", namely, that the controversy was

one peculiarly within the domain of state control, that federal court jurisdiction rested only on adverse citizenship and not on any federal constitutional right and that there was nothing in the Constitution to prevent the people of a state from giving to the courts and taking away from the legislature matters concerning the territorial boundaries of a municipal corporation.

(c) Next were two cases in which collateral inquiry was permitted. In one the attack was successful; in the other it was not.

The first was *Vallely* v. *Northern Fire & Marine Ins. Co.*, 1920, 254 U.S. 348. There a bankruptcy court had entertained an involuntary petition against the insurance company despite the fact that the Bankruptcy Act expressly excepted insurance corporations. After the time to appeal had expired the company moved to vacate the adjudication for lack of jurisdiction. The motion was sustained by the trial court. The Supreme Court, on certificate, approved, saying, p. 355-6:

> "The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations, and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of 'municipal, railroad, insurance, or banking' corporations to their creditors and their creditors to them, to other provisions of law. It is easy to see in what disorder a different policy would result."

Policy was thus emphasized.[2]

[fol. 340] The second case was *Grubb* v. *Public Utilities Comm'n*, 1930, 281 U.S. 470. Here the State Commission had denied an applicant an operating certificate for his buses and on his appeal, with others, the highest state court had affirmed. The applicant then pursued an injunction suit he had instituted in federal court. The Commission pleaded the state judgment as a bar. Although the appeal was decided against the applicant, the Supreme Court clearly

[2] See also *Kalb* v. *Feuerstein*, 1940, 308 U.S. 433, 438, 440.

held that the question of the Commission's subject-matter jurisdiction could be raised in the collateral proceeding, saying, p. 475:

> "That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter —and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent."

The difficulty of synthesizing a rule from the decided cases at that time in the law's development was intimated by the Supreme Court itself in *Vallely* when it said, by way of comment upon the opposing arguments (i) that any litigated issue should be open only to direct attack and (ii) that courts may not act beyond the power and authority conferred upon them, p. 354 of 254 U.S.:

> "Which of the propositions shall prevail in a given case cannot be dogmatically asserted, and cases of their consideration and application can be cited against each other."

Thus, although by that time it was clear that prior determinations of subject-matter jurisdiction were sometimes open to collateral inquiry, it remained unclear as to [fol. 341] when such an inquiry would be entertained or as to what considerations would control that decision. This uncertainty was noted in the 1934 original edition of the Restatement of the Law of Conflict of Laws. After stating the rule, in § 451, that a party appearing in a proceeding will be precluded from questioning the jurisdiction of the court over his person in any subsequent proceedings in that or any other state if the court in which he appeared purported to render a judgment against him, the American Law Institute by appended caveat[3] expressly with-

[3] "The Institute expresses no opinion whether and how far a party appearing and participating in the proceedings in a court

held comment as to subject-matter jurisdiction. Subsequent Supreme Court cases, however, decided within the following seven years, provided additional guide lines.

(d) Next was the divorce case of *Davis* v. *Davis*, 1938, 305 U.S. 32. The husband sought a divorce in Virginia. His wife appeared there specially to contest Virginia's jurisdiction on the ground that their marriage domicile was in the District of Columbia. The Virginia court held that it had jurisdiction of the subject-matter because, under Virginia law, the husband had established his residence in Virginia for the required length of time. The divorce was granted. The husband then sought enforcement of this decree in the District. The wife defended on the ground that the Virginia court lacked jurisdiction. The Supreme Court held that her voluntary appearance and litigation in Virginia precluded the collateral attack. The court, in support of its conclusion, cited only *Baldwin* v. *Iowa State Traveling Men's Association*, supra, 283 U.S. 522, which had to do with jurisdiction of the person. [fol. 342] The Davis result is consistently adhered to by the Supreme Court in divorce cases and the challenges therein to subject-matter jurisdiction. See, for example, *Cook* v. *Cook*, 1951, 342 U.S. 126, and cases cited.

(e) Then followed, within eighteen months, three non-divorce cases and a supporting dictum in a fourth case to the effect that res judicata was applicable, under the facts of those cases, to the issue of subject-matter jurisdiction. The first was *Stoll* v. *Gottlieb*, 1938, 305 U.S. 165, decided two weeks after *Davis*. There, in a bankruptcy situation, the Court said, pp. 171-3:

> "Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the oc-

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of any state is precluded from subsequently questioning the jurisdiction of the court over the subject matter of the action in the courts of that state or any other state if the court in which he appeared purported to render a judgment against him."

currence under consideration. Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. * * *

"* * * After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

"That a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in *Forsyth* v. *Hammond.*" (footnotes omitted).

It sought to distinguish, pp. 175-6, but did not overrule its earlier and seemingly contrary result in *Vallely,* also [fol. 343] a bankruptcy case, not on the basis of the actual holding in *Vallely*—that the lack of jurisdiction of the subject-matter was clear and indisputable and that failure to recognize this would be violative of a paramount congressional policy—but on a ground not relied upon in *Vallely* itself, namely, that the jurisdictional question actually had not been litigated there and judgment was obtained by default.

The second was *Treinies* v. *Sunshine Mining Co.,* 1939, 308 U.S. 66. There an Idaho court had determined that an award of corporate shares by a Washington court, sitting in probate but resting its decision upon an alleged post-distribution settlement between beneficiaries, was void for lack of subject-matter jurisdiction. In the corporation's subsequent interpleader action in a federal forum the Supreme Court said, p. 78, perhaps with some inconsistency of statement:

"The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond ques-

tion. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.

"One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (footnotes omitted).

The third was *Chicot County Drainage Dist.* v. *Baxter State Bank*, 1940, 308 U.S. 371. Here the court held that the opportunity in the prior proceeding to raise the question of jurisdiction, although unavailed of, was sufficient to invoke the defense of res judicata. It said, p. 377, that a court "has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, [fol. 344] while open to direct review, is *res judicata* in a collateral action."

The dictum to the same general effect is in *Sunshine Anthracite Coal Co.* v. *Adkins*, 1940, 310 U.S. 381, 403.

These cases thus seem to emphasize the actual litigation, or the opportunity for litigation, of the question of subject-matter jurisdiction in the first forum. None of them involved real estate.

(f) Also in 1940, however, came the case of *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506. Here the policy factor, originally given weight in *Vallely*, again appears. The government, on behalf of Indian Nations, had filed a claim in a receivership in Missouri. The court there had entertained the debtor's cross-claim and, in the ensuing reorganization proceedings, rendered judgment on it despite the fact the government was immune from suit without its consent. No review of this judgment was sought. The government then asserted its claim in another federal court against the debtor's surety. The Supreme Court, by Mr. Justice Reed who had also written the opinions in *Gottlieb* and *Treinies*, this time refused to regard the judgment in the reorganization proceedings as a bar and said, pp. 512-4:

"No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against

the United States. The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. * * * The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. * * * [T]his immunity cannot be waived by officials. * * * [fol. 345] "The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. * * * Consent alone gives jurisdiction to adjudge against a sovereign. * * * Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body." (footnotes omitted).

It is thus apparent that there are situations where the policy underlying nonrecognition of jurisdiction of the court whose judgment is under attack will override application of the res judicata principle. See *United States* v. *Eastport Steamship Corp.*, 2 Cir., 1958, 255 F.2d 795, 803-4.

(g) The final Supreme Court case, *Jackson* v. *Irving Trust Co.*, 1941, 311 U.S. 494, evidently gave the court no concern as to considerations of overriding policy. An action had been brought against the Alien Property Custodian. One of the defenses raised suggested that the claimants were "enemies" within the meaning of the governing act and were precluded from recovery. This issue was decided against the government. No appeal was taken. Some years later the government moved to set aside the earlier decree on the ground of lack of jurisdiction. The Supreme Court held that the prior adjudication precluded further inquiry, rejected an argument resting on governmental immunity, and said, p. 503:

"[W]hen the dismissal of the suit was asked by counsel for the Government on the ground that Sielcken

> was an enemy under the Act, the issues thus raised were the same as those which pertained to the so-called 'jurisdictional' question of right to sue * * *. However the issues were labeled the court was authorized [fol. 346] to determine them. * * * If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken."[4]

To be able to extract from this series of cases a short and simple governing rule is perhaps too much to expect. Our own analysis of these cases coincides with the comprehensive, although complex, statement propounded by the American Law Institute subsequent to the appearance of its 1934 caveat, footnote 3, supra, and in replacement of that caveat. This statement was developed and presented by the Institute in its 1942 Restatement of the Law of Judgments and in the 1948 revision of § 451 of its Conflicts Restatement. After leaving unchanged its position with respect to a prior adjudication of jurisdiction over the person (that such a determination is not open to collateral inquiry where the defendant had appeared to object to the jurisdiction), § 9 of the Judgments Restatement and § 451(1) of the Conflicts Restatement, it is said, § 10 and § 451(2), respectively:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate

[4] Lower court opinions on the subject over the years are numerous. Most of these repeat general rules and, in view of the Supreme Court cases which have been cited, we make no attempt to analyze them. Illustrative Eighth Circuit cases are *Foltz* v. *St. Louis & S. F. Ry.*, 1894, 60 F. 316; *Hartford Life Ins. Co.* v. *Johnson*, 1920, 268 F. 30; *Walling* v. *Miller*, 1943, 138 F.2d 629; cert. den. 321 U.S. 784; and *Mitchell* v. *Village Creek Drainage Dist.*, 1946, 158 F.2d 475. Compare *Krone* v. *Lacy*, 8 Cir., 1962, —— F.2d ——.

to be considered in determining that collateral attack should be permitted are that

[fol. 347] (a) the lack of jurisdiction over the subject matter was clear;

(b) the determination as to jurisdiction depended upon a question of law rather than of fact;

(c) the court was one of limited and not of general jurisdiction;

(d) the question of jurisdiction was not actually litigated;

(e) the policy against the court's acting beyond its jurisdiction is strong."

The Judgments Restatement contains comments interspersed with illustrations obviously based upon the Supreme Court cases cited above and the Conflicts Restatement revision makes specific reference to *Davis, Gottlieb* and *Treinies*.

We regard this as a correct statement of the law as the Supreme Court has developed it. We must then apply it to the facts presently before us.

We have a situation where land is in issue and where that land lies either in Nebraska or in Missouri. The determination of that question on the merits obviously coincides with the determination of the question of jurisdiction itself. The two courts involved are those of the adjoining states in one of which the land must lie. The Nebraska courts decided in favor of Nebraska. The Missouri federal court says it would have decided in favor of Missouri had it not felt itself bound by res judicata. With land at issue, we seem to have a factual situation of first impression.[5]

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[5] Fifty years ago the identical jurisdictional issue was raised in this court. *Whiteside* v. *Norton*, 8 Cir., 1913, 205 F. 5, cert. den. 232 U.S. 726, appeal dismissed 239 U.S. 144. The issue there concerned title to a small island which had formed in the St. Louis River where that river constitutes the boundary between Minnesota and Wisconsin. The defendant claimed that the federal circuit court for the district of Minnesota "was without jurisdiction, for

[fol. 348] It is immediately evident that none of the first four factors mentioned by the Restatements as among those appropriate for consideration on the question of collateral attack are present here: The Nebraska courts' lack of jurisdiction is not particularly clear. The dispute is almost entirely one of fact rather than of law.[6] The Nebraska courts were certainly courts of general jurisdiction. And the jurisdictional question was fully litigated.[7] This leaves among the stated factors only the fifth one resting on policy. Is there, then, a strong policy in this kind of case against a court's acting beyond its jurisdiction?

We could take the position that where four of the five stated factors are absent and where we are concerned with decisions of courts of primary jurisdiction of only those states where the land could possibly be located, and where the jurisdictional inquiry necessarily coincides with the merits, the principle of res judicata should prevail. This would amount to a recognition, as the Supreme Court ob-[fol. 349] served in *Gottlieb*, supra, p. 172 of 305 U.S., that "There is no reason to expect the second decision will be

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the reason that the land in controversy is in the state and district of Wisconsin, and therefore beyond the jurisdiction of the federal court sitting in Minnesota." This court decided the controversy on the merits and said, p. 13:

> "It is also urged that * * * because this is an action in rem, and the land in the state of Wisconsin, the Minnesota court is without jurisdiction for that reason. These contentions raise questions of serious moment; but in view of the conclusions reached upon the merits of the controversy, it is deemed unnecessary to extend this discussion further."

This court therefore came right up to the issue presently before us but was able to avoid deciding it.

[6] The parties are not in disagreement as to the law concerning the effect of accretion and avulsion upon mid-channel state boundaries. See *Nebraska* v. *Iowa*, 1892, 143 U.S. 359, 370.

[7] The Durfees place particular emphasis upon the fact that the issue of subject-matter jurisdiction was litigated in the Nebraska proceeding. This fact, although often relied upon, is not necessarily determinative. It is only one of the several factors appropriate for consideration under the Restatement rule. See Judgments Restatement, § 10, comment c.

more satisfactory than the first." There would be little legal illogic in such a holding and it would parallel the situation as to jurisdiction over the person.

We must recognize, however, that considerations of policy are present and at play in the situation before us and that it is policy which constitutes the fifth factor. We are here concerned with judicial disposition of real estate and we are here confronted with the traditional policy of immunity of a state's real property from direct disposition by a sister state's judgment.

There are Supreme Court expressions suggesting the existence of a real estate policy of this kind:

1. The earlier Supreme Court cases which refused to apply the principle of res judicata in problems of subject-matter jurisdiction and which permitted collateral inquiry were primarily real property cases. Many of these have been cited above.

2. The later Supreme Court cases which apply the barrier of res judicata do not concern real estate and strongly indicate that they were not intended to control real property situations. Thus in the bankruptcy case of *Stoll* v. *Gottlieb*, supra, the Court said, p. 176 of 305 U.S.:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

A comparable reservation appears in *United States* v. *United States Fidelity & Guaranty Co.*, supra, where the [fol. 350] Court, in speaking of its holding in *Chicot*, and seemingly limiting it, said, p. 514 of 309 U.S.:

> "In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination • • • No examination was made of the susceptibility to such objection of numerous groups of judgments concern-

> ing status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts." (footnotes omitted).

Compare the language in *McCormick* v. *Sullivant*, 1825, 23 U.S. (10 Wheat.) 192, 202.

3. Certain of the cases which hold that the full faith and credit clause does not preclude collateral inquiry into subject-matter jurisdiction reveal particular fervor with respect to extra-territorial in rem judgments of state courts. See *Carpenter* v. *Strange*, 1891, 141 U.S. 87, 105-106; *Fall* v. *Eastin*, 1909, 215 U.S. 1; *Olmsted* v. *Olmsted*, 1910, 216 U.S. 386; *Hood* v. *McGehee*, 1915, 237 U.S. 611; *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, supra, p. 296 of 137 U.S.; *Williams* v. *North Carolina*, 1942, 317 U.S. 287, 294, footnote 5; and *Milwaukee County* v. *M. E. White Co.*, 1935, 296 U.S. 268, 273-4.

4. Several Supreme Court dicta are significant although they were pronounced under wholly distinguishable circumstances. In *Pennoyer* v. *Neff*, supra, p. 720 of 95 U.S., the Court said:

> "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

[fol. 351] In *Huntington* v. *Attrill*, 1892, 146 U.S. 657, 669, it was said:

> "Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession."

See also the quotation, supra, from *Noble* v. *Union River Logging R. R.*, p. 173 of 147 U.S.

5. Any apparent out-of-jointedness of the older case of *Forsyth* v. *Hammond*, supra, can be explained by the absence there of a multi-state conflict and by the natural hesitation of the Court to intrude upon what it felt was a matter involving construction by state courts of a state's constitution and statutes. See pp. 518-9 of 166 U.S.

We are aware that a state itself is evidently not bound by res judicata by the results of litigation between private parties which has an indirect bearing upon the state's interest but to which the state was not a party. *United States* v. *Lee*, 1882, 106 U.S. 196; *Land* v. *Dollar*, 1947, 330 U.S. 731, 736-7. Nevertheless, we are inclined to feel that the courts of a state which is directly and adversely affected by the first forum's determination in its state's favor of the situs of land as between the two states should be able properly to inquire into the jurisdictional grounds of the first holding and should not be prevented from so doing by an immovable concept of res judicata. Of course, boundary matters, where directly contested between states themselves, fall within the original jurisdiction of the Supreme Court by Article III, § 2, of the Constitution. See *Missouri* v. *Nebraska*, 1904, 196 U.S. 23. But a state's sovereignty, the validity of its own land titles and its power to tax, can be affected, although indirectly, by proceedings of the very kind which have taken place here. [fol. 352] It seems not unreasonable or improper, therefore, as a matter of policy where land is concerned, to allow a court of the affected state the opportunity to satisfy itself as to the first forum's subject-matter jurisdiction. Permitting collateral attack does not mean that the attack is always successful. See *Grubb* v. *Public Utilities Comm'n*, supra, 281 U.S. 470. Compare *Moore* v. *Rone*, Mo. App., 1962, 355 S.W.2d 398.

After careful consideration we conclude that, for a land case such as this, a policy of careful recognition of jurisdictional limitations and of permitting inquiry into the basis of subject-matter jurisdiction outweighs any conflicting res judicata principle. We feel that, as a matter of basic legal philosophy the question of excessive judicial action by way of claimed jurisdiction over land presents a fundamental and classic situation where validity may

be a proper subject of inquiry despite opposing considerations in favor of the termination of litigation. We therefore hold that the United States District Court for the Western District of Missouri in this case had the power to make collateral inquiry as to the jurisdictional basis of the Nebraska judgment.

As we have noted, the trial court in its findings and memorandum, clearly indicated that it was its conclusion on the merits that the land was Missouri land at the time Julia Duke received her swamp land deed. Although we feel that this conclusion finds ample support in the record, we deem it advisable, rather than to reverse with specific directions, to return the entire case to the district court so that it may take such further action on the merits of the main suit and on the cross-complaint as it feels is now indicated by the results we have reached here. Of course, if Julia prevails in the main action, the cross-complaint [fol. 353] for an accounting and an injunction will necessarily be decided adversely to the Durfees.

The judgment below is therefore reversed and the case is remanded for further proceedings consistent with the views herein expressed.

[fol. 354]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1962

No. 16,763

Appeal from the United States District Court for the Western District of Missouri.

JULIA E. DUKE, Appellant,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife.

No. 16,764

Appeal from the United States District Court for the Western District of Missouri.

GENE DURFEE and LAURA DURFEE, Appellants,

vs.

JULIA E. DUKE.

JUDGMENT—September 18, 1962

These Causes came on to be heard on the original files of the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in these causes be, and the same is hereby, reversed.

And it is further Ordered by this Court that these cases be, and the same are hereby, remanded to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court this day filed herein.

September 18th, 1962.

Approved for the Court:

Robert C. Tucker, Clerk, U. S. Court of Appeals for the Eighth Circuit.

[fol. 355]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING EN BANC AND DENYING REHEARING—October 11, 1962

There is before the Court petition of Gene Durfee and Laura Durfee, husband and wife, for rehearing en banc and on consideration of such petition, it is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

October 11, 1962

Entered at the direction of the Court.

Robert C. Tucker, Clerk, U. S. Court of Appeals, 8th Circuit.

[fol. 356]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1962

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—October 16, 1962

On Consideration of the motion of Gene Durfee, et al., for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

October 16th, 1962

[fol. 357] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 358]

SUPREME COURT OF THE UNITED STATES

No. 593—October Term, 1962

GENE DURFEE, et al., Petitioners,

vs.

JULIA E. DUKE.

ORDER ALLOWING CERTIORARI—January 7, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.